

INTERNATIONAL CENTRE FOR DISPUTE
RESOLUTION

Big Sky Juice, LLC, dba Afghanistan Natural Beverage, Claimant

v.

Overseas Private Investment Corporation, Respondent

ICDR Case No. 50 195 T 00233 12

PARTIAL FINAL AWARD

The undersigned Arbitrator, having been duly designated in accordance with the below mentioned arbitration agreement between Big Sky juice, LLC (doing business as Afghanistan Natural Beverage) (“Big Sky” or “Claimant”) and Overseas Private Investment Corporation (“OPIC” or “Respondent”) dated April 11, 2007, and having been duly sworn, and having duly heard the allegations and proofs of Claimant and Respondent (referred to herein collectively as the “Parties” and individually as a “Party”), does hereby award as follows:

I. Introduction

This Partial Final Award is made pursuant to the international arbitration rules (the “International Rules”) of the International Centre for Dispute Resolution (the “ICDR”) of the American Arbitration Association (the “AAA”) and the May 2008 Guidelines for Arbitrators Concerning Exchanges of Information (the “ICDR Guidelines”).

By its Notice of Arbitration and Statement of Claim (the “Statement of Claim”) dated March 20, 2012, Claimant seeks in this compensation arising out of claims by Claimant under a contract of insurance against in convertibility, expropriation, political violence, permanent abandonment, as defined below, between OPIC and Big Sky, Form 234KGT 12-85 SBC NS (Rev. 9/05), OPIC Contract of Insurance No. F744, entered into on April 11, 2007 (the “Insurance Contract”).

OPIC asserted a series of defenses to Big Sky’s claims in its Statement of Defense, dated May 9, 2012 (the “Statement of Defense”).

On September 20, 2013, OPIC submitted Respondent’s Motion for an Award Pursuant to Article 16(3), dated September 20, 2013 (the “Dispositive Motion”). After several mutually agreed time extensions, Big Sky filed Claimant’s Response to Respondent’s Motion for an Award Pursuant to Article 16(3) and Request for Additional Time to Supplement the Response, dated December 2, 2013 (the “Response”). These proceedings are further detailed in Part II below.

For the reasons more fully set forth below, the Arbitrator grants Respondent’s Dispositive Motion and dismisses Claimant’s claims in its Statement of Claim with prejudice. The Arbitrator further direct Respondent to present its claims for fees, costs and expenses, on the basis of the procedure set forth in Part VII below.

Claimant Big Sky is a limited liability company organized under the laws of the State of Colorado, having its place of business at 2452 Patterson, Suite 303, Grand Junction, CO 81505.

Respondent OPIC is a United States governmental agency established pursuant to *inter alia* 22 U.S.C. Sec. 2191 *et seq.*, having its principal offices at 1100 New York Avenue, N.W., Washington, D.C. 20527.

The Parties entered into the Insurance Contract on April 11, 2007, covering Big Sky's Investment (as defined therein) in Afghanistan Natural Beverage ("ANB").

Section 10.04 of the Insurance Contract provides for submission of any controversy or claim arising out of or relating to the Insurance Contract to arbitration under the International Rules.

10.04 Arbitration

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in Washington, D.C. according to the then prevailing International Arbitration Rules of the American Arbitration Association. The number of arbitrator shall be three. Unless the Investor initiates arbitration, OPIC's liability shall expire one year after OPIC notifies the Investor of its final determination regarding an application for compensation. A decision by the arbitrator shall be final and binding, and any court having jurisdiction may enter judgment on it.

Notwithstanding the provision in Section 10.04 calling for three arbitrators, the Parties agreed at a conference call among the ICDR and the Parties on June 29, 2012 to proceed with the arbitration before a tribunal of one arbitrator rather than three arbitrators. The ICDR confirmed that agreement in a letter of the same date to the Parties.

In accordance with Section 10.04 of the Insurance Contract, the seat of this arbitration is Washington, D.C.

Section 10.07 of the Insurance Contract specifies that the Insurance Contract "shall be governed by and construed and enforced in accordance with the law of the State of New York as if all Parties were residents of that State." Accordingly, New York law governs the substantive rights and obligations of the Parties under the Insurance Contract.

The Arbitrator has carefully reviewed all of the submissions and evidence presented by the Parties in these proceedings, even if a particular filing or exhibit is not specifically mentioned in this Partial Final Award.

II. Background to the Proceedings

On August 19, 2009, Big Sky notified OPIC that Big Sky had abandoned its Investment in ANB. Big Sky further stated that it would file a claim for compensation pursuant to the Insurance Contract. On October 8, 2009, Big Sky submitted to OPIC a claim for compensation under the

Insurance Contract in the amount of \$1 million for “political violence” and \$1 million for “permanent abandonment.”

Until early 2011, Big Sky pursued its claim under OPIC’s claims determination process. Following submissions by Big Sky directly and in response to questions posed by OPIC, in April 2010 OPIC provided to Big Sky a draft Memorandum of Determinations concluding that OPIC would deny Big Sky’s claim. That proposed denial rested on OPIC’s preliminary conclusion that Big Sky had failed to comply with a number of provisions in the Insurance Contract and that the events at issue did not fall within the “political violence” or “abandonment” coverages of the Insurance Contract.

On July 20, 2010, in response to OPIC’s request for comments on the draft Memorandum of Determinations, Big Sky advised it would submit additional information supporting its claim. Big Sky made that submission on August 11, 2010. Following further correspondence, Big Sky provided OPIC on November 19, 2010 with comments on the draft Memorandum of Determinations.

On March 23, 2011, OPIC issued its final Memorandum of Determinations denying Big Sky’s claims on grounds of *inter alia* failure to comply with the terms of the Insurance Contract and an absence of coverage. OPIC explained the primary grounds for denial in its Dispositive Motion. According to OPIC:

- *First*, Big Sky had not demonstrated that it had made the investment of \$1,000,000 in the form of subordinated debt and up to \$1,055,000 in equipment as required by the contract. (*Id.* at OPIC-BS00117.)
- *Second*, Big Sky had failed to maintain separate books and records for ANB as required by the Insurance Contract. *Id.* Given the serious gaps in Big Sky’s application relating to the existence of the Insured Investment, the Memorandum concluded that the “Application does not provide the accurate financial information regarding [ANB] and its parent that is contractually required and needed in order to ascertain the actual book value of the Insured Investment and to clarify what assets of [ANB] could potentially be covered under the Claim.” (*Id.* at OPIC-BS00116.)
- *Third*, the Memorandum found that, even if Big Sky had otherwise met its obligations under the contract, Big Sky had failed to demonstrate that it actually abandoned its investment in ANB. While Big Sky initially claimed that operations at the ANB plant ceased prior to August 19, 2009, and had not recommenced (*see* Ex. 8, at OPIC-BS00125 (“production ceased in 2009 and ANB is unable to start back up”)), the Memorandum described uncontroverted evidence that ANB had been operating as recently as October 2010. (Ex. 7 at OPIC-BS00107.) After repeated efforts to obtain an explanation from Big Sky as to who was operating ANB and under what authority, OPIC concluded that Big Sky had not established proof of permanent abandonment. (*Id.* At OPIC-BS00112.)

- *Fourth*, Big Sky had failed to establish that political violence was the sole, direct, and immediate cause for the alleged cessation of ANB's operations, as required under the express provisions of the Insurance Contract. (*Id.* at OPIC-BS00112-115.)

Big Sky objected to that denial, filing its Statement of Claim with the ICDR on March 20, 2012.

OPIC filed its Statement of Defense with the ICDR on May 9, 2012. In that Statement of Defense, OPIC advised that it would be submitting a motion under Art. 16(3) of the International Rules seeking dismissal with prejudice a Big Sky's claims.

The ICDR appointed the undersigned as sole arbitrator in this proceeding by notice the Parties on April 22, 2013. The ICDR provided to the Parties a Disclosure Statement from the undersigned Arbitrator dated April 23, 2013. In that Disclosure Statement, the undersigned made various disclosures and further stated *inter alia*:

I do not maintain a current or complete list of engagements, publications, memberships or associations, whether on my website or otherwise. I am a member of or teach at a number of organizations. I am Editor-in-Chief of Transnational Dispute Management, from whom I receive a small fixed honorarium, and am a member of boards of editors of other periodicals. Advertising, sponsorship or other support by such a periodical or its affiliates for conferences and similar events is a matter within the authority of the publishers of those periodicals, not the editors. I am a member of the Board of Directors of the American Arbitration Association. I also attend numerous conferences and events related to *inter alia* arbitration and litigation, international business transactions, international law and commercial, investment, project finance and finance law. I am a member of a number of groups on Facebook and LinkedIn. I do not maintain records of fellow members, speakers, advertisers, sponsors, organizers, faculty, students, authors, participants, committee members, employees or attendees of such organizations, networks, periodicals or events, as that is not by itself a "known ... relationship which might reasonably affect impartiality or independence in the eyes of any of the parties." Canon II, Code of Ethics for Arbitrators in Commercial Disputes, American Bar Association (2004); General Standard 2, International Bar Association Guidelines for Conflicts of Interest in International Arbitration (2004). I request any party in an arbitration for which I am proposed as an arbitrator to promptly disclose any facts or circumstances leading that party to question my impartiality or independence as soon as that information is reasonably available to the party and, for that purpose, to undertake a reasonable search of available information promptly after learning of my prospective appointment as arbitrator. I make this statement in disclosure statements in all arbitrations for which I am nominated as an arbitrator.

No Party has raised any objection to the service of the undersigned as arbitrator in this arbitration.

Pursuant to notice from the ICDR dated June 19, 2013, the Arbitrator conducted an administrative hearing by conference call with the Parties on June 20, 2013. During that call, the Parties and the

Arbitrator discussed, among other matters, the timetable and procedures for OPIC's prospective dispositive motion. The Parties determined on that call to delay consideration of other steps in the arbitration pending resolution of OPIC's prospective motion.

During that call, the Parties agreed that OPIC would submit its Dispositive Motion by September 20, 2013, with Claimant filing its Response thereto within thirty days thereafter (i.e., not later than October 21, 2013). In addition, Big Sky advised that it would file a more detailed statement of claim by July 20, 2013. In the event, Big Sky did not submit a modified statement of claim.

On July 8, 2013, the Parties submitted a joint Status Report agreeing that dispositive motion issues would be addressed through written submissions supported by documentary evidence and affidavits and that the parties did not anticipate the need for live witness testimony.

The parties by and through their respective counsel present this Status Report as follows: Subject to the preference of the arbitrator, the parties agree that the preliminary issues will be addressed through written submissions supported by documentary evidence and affidavits. The parties do not anticipate the need for live witness testimony. The parties will adhere to the agreed-upon briefing scheduling, with Respondent reserving the right to reply to any facts or arguments raised for the first time in Claimant's submission.

On September 20, 2013, OPIC filed its Dispositive Motion, together with a supporting Affidavit of Mr. Glenn Ricciardelli, a supporting Declaration of Ms. Suzanne Etcheverry, exhibits and authorities.

By Stipulation dated October 16, 2013, the Parties agreed to extend the date for Claimant to submit its response to the Dispositive Motion to November 21, 2013 "[d]ue to illness and hospitalization of Claimant's counsel, as well as Claimant's work schedule upon his return to work." The Arbitrator consented to that extension by email the same day.

On November 18, 2013, the Parties exchanged communications confirming a further mutually agreed extension of the time for Big Sky to respond to the Dispositive Motion, this time until December 2, 2013. The Arbitrator again consented by email the same day.

On December 2, 2013, Big Sky submitted its Response, together with an affidavit from Mr. James Ritchie, the sole member and manager of Big Sky Juice, LLC, and an Expert Report from Mr. Robert D. Johnson relating certain accounting and financial matters, exhibits and authorities.

In that response, Big Sky sought additional time "to obtain the records from the bank [it used during the pertinent time], including actual copies of the checks to provide back up to amounts contained in its booking keeping and tax returns." On December 4, 2013, OPIC objected to Big Sky's request for additional time to supplement the record. On the same day, the Arbitrator denied Big Sky's request, holding that "no further extension to allow discovery to supplement the Response is warranted for cumulative evidence as to a matter conceded by the opposing party." In full, the Order reads as follows.

ORDER WITH RESPECT TO CLAIMANT'S REQUEST FOR
ADDITIONAL TIME TO SUPPLEMENT RESPONSE

Claimant Big Sky Juice, LLC has requested additional time for discovery and to supplement its December 2, 2013 Claimant's Response to Respondent's Motion for an Award Pursuant to Section 16(3) and Request for Additional Time to Supplement the Response (the "Response"). For the following reasons, I deny Claimant's request for additional time to supplement the Response.

According to the Response, Claimant's request for additional time is predicated on its efforts to obtain cancelled checks from the bank it previously used. Claimant states in both Paragraphs 2 and 23(a) of the Response that it has "requested from the bookkeeper to obtain from the bank the cancelled checks of James Richie, to support the capital infusion of the \$1,000,000, due to the internal process of the bank's record keeping those records have not yet been received."

In Paragraph 28 of the Response, Claimant further asserts that "[a]s noted in Johnson's [Mr. Robert D. Johnson's December 2, 2013] report, Big Sky has been unable, with the use of subpoena, to access certain records from the bank that it used during the pertinent times. Big Sky has tried to get the bank, without aid of any subpoena, to obtain, for example, copies of the actual checks that were used to make capital contributions to Big Sky. (see Johnson Report, Page 8 and 9). Big Sky needs additional time to obtain records from the bank, including actual copies of the cancelled checks to provide back up to amounts contained in its bookkeeping and tax returns." On pages 8 and 9 of the referenced Report, Mr. Johnson states "[w]e have requested from the bookkeeper to obtain from the bank the canceled checks of James Richie, to support the capital infusion of the \$1,000,000, due to the internal process of the bank's record keeping those records have not yet been received." Mr. Johnson further states on page 9 of his Report that "[t]he canceled checks have been requested from the bank."

Paragraph 28 of the Response describes these cancelled checks as "back up to amounts contained in its [Big Sky's] bookkeeping and tax returns." Paragraphs 2 and 23(a) of the Response both state: "However, two additional items of support exist: 1) the Federal Income Tax Return, Form K-1, 2008, Beginning Capital Account \$1,023,153 of James Richie; and 2) Quick Books General Ledger Detail accounts reflecting the cash injection by Mr. Richie, in excess of the \$1,000,000; the Federal Income Tax Return, Balance Sheet and Detail Asset listing, coupled with the Detail Balance Sheet Detail provides evidence of the fixed assets being in excess of the \$1,055,000 requirement. (Johnson Report, Page 8, Disputed Facts)." Page 9 of Mr. Johnson's Report contains an identical statement as to those additional items.

Moreover, Paragraph 11 of the Response quotes Mr. Johnson's opinion, found on page 9 of his Report as well, that "[t]he documented evidence of Mr. Ritchie's contribution is evidence by the IRS Form 1065 K-1, beginning capital account and by the statement of checks from the bank."

Respondent OPIC argues in the reply letter from its counsel dated December 3, 2013 that the cancelled checks in question are immaterial and irrelevant to the matters that are the subject of its Motion. At this stage, I decline to make any ruling on the materiality or relevancy of the information purportedly encompassed by the checks in question.

However, Respondent further states in the reply letter that "OPIC does not dispute Mr. Ritchie made capital contributions to Big Sky and, as Mr. Johnson points out in his report, Mr. Ritchie's capital contribution to Big Sky can be established based on documents already in the record." Thus, asserts Respondent, the cancelled checks are "duplicative" and the failure by the bank to provide them at this time does not justify a further extension of a deadline that has already been mutually extended on previous occasions.

Thus, Claimant Big Sky and Mr. Johnson have stated that the cancelled checks are solely "back up" for information in the record and that "two additional items of support exist." Mr. Johnson points in his Report to the tax return, the Quick Books records and the statement of checks from the bank as support for the making of the capital contributions to Big Sky by Mr. Ritchie. Respondent OPIC has conceded that Mr. Ritchie made capital contributions to Big Sky and that the cancelled checks would be duplicative of information already in the record before me.

Moreover, Claimant has sought, and obtained, several previous extensions of the date for its Response.

In these circumstances, no further extension to allow discovery to supplement the Response is warranted for cumulative evidence as to a matter conceded by the opposing party. *See, inter alia*, Article 16.1 of the ICDR International Arbitration Rules ("Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.") and Article 16.2 of those Rules ("The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute."). *Also cf.* Article 16.3 of those Rules ("The tribunal may in its discretion ... exclude cumulative or irrelevant testimony or other evidence ...").

Nothing in this Order shall be deemed in any manner to address the merits of Respondent's Motion for an Award Pursuant to Article 16(3) or any part of Claimant's Response other than

Claimant's request for additional time to supplement that Response.

So Ordered.

Notwithstanding the Tribunal's denial of Big Sky's request for further time to supplement the record, on December 20, 2013 Big Sky submitted copies of a number of checks and related deposit slips. On December 23, 2013, following inquiry from the Arbitrator, OPIC consented to that supplemental submission notwithstanding Big Sky's intentional disregard of the Tribunal's Order.

Respondents interpreted the Tribunal's Order With Respect to Claimant's Request for Additional Time to Supplement Response to deny that request, rendering Claimant's December 20th disclosure of additional documents improper. One of the grounds on which Respondent opposed Claimant's Request for Additional Time to Supplement its Response was that evidence of Mr. Ritchie's investment in Big Sky Juice, LLC was irrelevant to the dispositive threshold issues raised in Respondent's Motion for an Award Pursuant to Article 16(3). A review of Claimant's December 20th disclosure confirms the irrelevance of the proffered documents.

Nevertheless, under the circumstances, Respondent does not object to the supplemental disclosure being made part of the record and considered to the extent, and in the manner, the Tribunal deems appropriate.

Accordingly, the documents contained in Big Sky's supplemental submission form part of the record in this proceeding.

III. Arbitral Jurisdiction

OPIC has not objected to arbitral jurisdiction over the claims by Big Sky in the Statement of Claim. Article 15(3) of the International Rules provides that "A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection." No such objection having been received, this Tribunal accordingly has arbitral jurisdiction over Big Sky's claims in this arbitration.

IV. Authority to Make a Summary Disposition

OPIC requests the Tribunal to dispose summarily of Big Sky's claims in the Statement of Claim pursuant to Art. 16(3) of the International Rules. Article 16(3) provides:

The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

In this regard, Big Sky argues that while the AAA Commercial Arbitration Rules contain a provision expressly authorizing dispositive motions, no such provision exists in the International Rules. Moreover, Big Sky seeks to distinguish other arbitral decisions under the International

Rules, other arbitration rules and the Federal Arbitration Act (the “FAA”) where an arbitral panel granted summary judgment. Big Sky further points to a conclusory paragraph in the Ritchie affidavit:

11. It is necessary for Big Sky to put on oral testimony to establish its record keeping procedure, why it filled out its tax returns in a manner it did, why it was forced to abandon the operations and what steps it took to attempt not to abandon it, and to establish that it abandon the operations.

Big Sky’s arguments are not persuasive.

Numerous arbitral decisions and court judgments attest to the authority of an arbitral tribunal to dispose of claims in a summary proceeding where appropriate under applicable principles of law, including decisions in arbitrations under the International Rules. *See, e.g., ROTA Int’l Exporting, LLC v. OPIC*, Case No. 50 195 T 000 10 07, Final Award (2008), in 2 REPORTS OF OVERSEAS PRIVATE INVESTMENT CORPORATION DETERMINATIONS (hereinafter “REPORTS OF OPIC DETERMINATIONS”), at 1019 (Mark Kantor et al. eds., Oxford University Press 2011) (exercising authority under Article 16(3) of the Arbitration Rules to bifurcate case and granting motion for an award disposing of the case based on a threshold dispositive issue); *Buchheit Int. Ltd. v. OPIC*, Case No. 50 T 195 00361 03, Final Award (2004), in 2 REPORTS OF OPIC DETERMINATIONS, at 808 (granting motion filed pursuant to AAA Rule 30(b) seeking dismissal of all claims); *ARMA, S.R.O. v. BAE Sys. Overseas, Inc.*, No. 13-494, 2013 U.S. Dist. LEXIS 118288, at *38 (D.D.C. 2013) (upholding arbitral award resolving matter on summary judgment and without a full evidentiary hearing where dispute could be resolved through interpretation of unambiguous contract language); *Thian Lok Tio v. Wash. Hosp. Ctr.*, 753 F. Supp. 2d 9, 19-21 (D.D.C. 2010) (upholding arbitrator’s grant of partial summary judgment dismissing eight out of ten of plaintiff’s claims); *Matthew v. Papua New Guinea*, No. 09 Civ. 385, 2009 WL 4788155, at *4 (S.D.N.Y. Dec. 9, 2009) (upholding ICDR Tribunal’s interim award dismissing claim for breach of contract because it was precluded by the Statute of Frauds); *TIG Ins. Co. v. Global Int’l. Reinsurance Co., Ltd.*, 640 F. Supp. 2d 519, 523 (S.D.N.Y. 2009) (holding that the arbitrator acted within his discretion by granting motion for summary judgment on certain claims); *Hamilton v. Sirius Satellite Radio Inc.*, 375 F. Supp. 2d 269, 278 (S.D.N.Y. 2005) (confirming an AAA award made after granting motion for summary judgment without an oral or evidentiary hearing); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, No. 01 C 5226, 2004 WL 442640, at *4-9 (N.D. Ill. Mar. 8, 2004) (confirming arbitration award granting summary judgment based on pleadings and without discovery or an evidentiary hearing); *Areca, Inc. v. Oppenheimer & Co., Inc.*, 960 F. Supp. 52, 55 (S.D.N.Y. 1997) (finding that arbitrators may proceed “with only a summary hearing and with restricted inquiry into factual issues”); *Burdette v. FSC Sec. Corp.*, No. 92-1030, 1993 WL 593997, at *3 (W.D. Tenn. Dec. 15, 1993) (upholding arbitration panel’s summary dismissal of claim based on the statute of limitations); *Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal.Rptr.2d 650, 655 (Cal. Ct. App. 1995) (upholding AAA arbitral award based on summary adjudications); *Brooks v. BDO Seidman, LLP*, 917 N.Y.S.2d 842, 846-47 (N.Y. Sup. Ct. 2011) (upholding the AAA Tribunal’s award granting summary judgment even though it was issued without an evidentiary hearing), *aff’d* 942 N.Y.S.2d 333, 334 (N.Y. App. Div. 2012) (“[A]rbitrators are not compelled to conduct hearings, and may decide a case on summary judgment.”).

Moreover, the FAA requires only that an arbitrator hear evidence “pertinent and material to the controversy.” 9 U.S.C. Sec. 10(c)(3). If an arbitrator can resolve a controversy by application of undisputed contract provisions to undisputed facts, then the arbitrator’s award is not subject to vacatur under the FAA for failure to undertake any additional evidentiary process.

Distinguished commentators concur that Art. 16(3) of the International Rules authorizes an arbitral tribunal to dispose of the case in summary proceedings where warranted. Thus, *Gusey, Hosking & Schwarz* write regarding Art. 16(3):

In addition, the Tribunal may direct Parties to “focus their presentations on issues the decision of which could dispose of all or part of the case” [quoting Art. 16(3)]. Similar to the rationale underlying bifurcation of the proceedings, it may not make sense to hear the entire case if the claim stands or falls on jurisdiction, time bar, or other dispositive preliminary issues can be heard separately without wasting the resources associated with hearing the entire case.

Gusey, Hosking & Schwarz, A Guide to the ICDR International Arbitration Rules, 16.21 at 176-177 (Oxford University Press 2011) (footnote omitted). *See also* Coe, International Commercial Arbitration: American Principles and Practice in a Global Context, 108 in. 107 (Transnational Publishers, Inc. 1997); *Fellas*, A Fair and Efficient International Arbitration Process, PLI Course Handbook: International Arbitration 2007 No. 10796, at 14-16 (2007); *Sussman & Ebere*, Reflections on the Use of Dispositive Motions in Arbitration, 4 NYSBA New York Dispute Resolution Lawyer 28 (Spring 2011); and authorities cited therein.

The Ritchie affidavit submitted by Big Sky in connection with its Response contains assertions that “it is necessary for Big Sky to put on oral testimony to establish its record-keeping procedure, why it filled out its tax returns in the manner it did, why it was forced to abandon the operations and what steps it took to attempt to not abandon it, and to establish that it abandon the operations.” As more fully explained in Part VI below, Mr. Ritchie’s statements do not create material disputed facts as to the subject matter of the Dispositive Motion, even without taking account of the conclusory nature of the assertions.

In light of the foregoing, the Arbitrator satisfied that Art. 16(3) of the International Rules affords authority to entertain the Dispositive Motion and, if warranted, dismiss Big Sky’s claims in this arbitration with prejudice.

V. Standards for Ruling on the Dispositive Motion

OPIC argues that an arbitral tribunal has authority under the International Rules to determine threshold issues, and seeks rulings on two dispositive issues based on the express terms of the Insurance Contract: (i) Big Sky’s purported failure to maintain financial records necessary to substantiate its compensation claim as required by, among other provisions, Art. 11.01(7) of the Insurance Contract, and (ii) Big Sky’s failure to make the required Investment in ANB pursuant to Art. 1.01(1) of the Insurance Contract.

Even though OPIC disputed the existence of political violence or abandonment covered within the scope of the Insurance Contract and asserted other contractual failures under the Insurance Contract, at this stage in the proceeding OPIC does not seek summary dismissal in the Dispositive Motion of the Statement of Claim for failure by Big Sky to show that such events occurred. The portions of Mr. Ritchie's affidavit asserting in conclusory terms that grounds exist for Big Sky's claim of compensation for injury due to political violence or abandonment are thus not relevant to the resolution of this Motion.

In addition to asserting as described above that Art. 16(3) does not grant the Arbitrator authority to undertake a summary disposition of its claim, Big Sky further argues in its Response that the Dispositive Motion does not satisfy the summary judgment standards set out in Federal Rules of Civil Procedure (F.R.C.P.) Rule 56(c):

If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Thus, Big Sky reminds us that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor", quoting *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 (1986). Rule 56 "by no means authorizes trial on affidavits." *Id.*

OPIC does not set out in its Dispositive Motion a standard to be employed by the Tribunal in assessing these "threshold" issues. However, in a letter dated December 12, 2013, OPIC states that:

For the avoidance of doubt, OPIC does not agree with Claimant's view that the asserted existence of disputed material facts constrains the Tribunal's discretion under Article 16(3) to issue an award upon the resolution of dispositive threshold issues or that the standards governing summary judgment motions in U.S. federal courts are applicable or relevant to this proceeding. Article 16(3) clearly permits a Tribunal to hold an evidentiary hearing to resolve any factual disputes on a threshold issues [sic] that may, as here, "dispose of all or part of the case."

OPIC has argued that the Tribunal has authority under the International Rules to issue an award upon summary proceedings as to threshold issues where material facts are in dispute. Without ruling on that argument, the Tribunal will adopt in this proceeding the F.R.C.P. Rule 56(c) summary judgment standard urged by Claimant, taking account as appropriate of the more expeditious and informal nature of arbitration. As the U.S. Supreme Court stated in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 40 (1991), quoting *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985), "by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.""

VI. Grounds for Disposition

The Tribunal reviews the independent grounds put forward by OPIC for summary dismissal in reverse order, looking first at OPIC's argument that Big Sky failed to make the Investment (as defined in the Insurance Contract) in the manner required by Section 1.01(1) of the Insurance Contract.

(A) Failure to Make Investment in Accordance with Insurance Contract

The Tribunal concludes that Big Sky failed to make the Investment in accordance with Section 1.01(1) of the Insurance Contract. Section 1.01(1) states that:

The Investor promises that the Investor contributed or will contribute (i) \$1,000,000 in the United States dollars, in the form of subordinated parent company debt as evidenced by an On-Demand Promissory Note dated December 31, 2005 (the "Debt Instrument") and (ii) up to \$1,055,000 worth of equipment (the "Covered Property") (together, the "Investment")

to

Afghanistan National Beverage
Street Area 9 Amniati
Pul-e-Charkhi industrial Park
Kabul, Afghanistan

A private corporation validly organized under the laws of Afghanistan

(the "Foreign Enterprise")

for which the Investor has acquired or will acquire 100% of the Foreign Enterprise (the "Investor's Share").

Big Sky was designated as the "Investor" on the cover page of the Insurance Contract.

Thus, Section 1.01(1) requires Big Sky to contribute to ANB (i) U.S.\$1,000,000 as subordinated debt evidenced by the On-Demand Promissory Note and (ii) equipment comprising Covered Property of up to U.S.\$1,055,000 in worth.

Section 11.01 of the Insurance Contract contains the agreement by Big Sky (the Investor) that "the Investment... shall be carried out as described." If the Investor commits a material breach or misrepresentation in connection with the Insurance Contract, then, under Section 11.02 of the Contract, OPIC may refuse to pay compensation, recover previously pay compensation and/or terminate the Insurance Contract by notice.

As the New York Court of Appeals has stated, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a

question of law for the court.”, *Vigilant Insurance Company v. Bear Stearns Company, Inc.*, 410 N.Y.3d 170, 884 N.E.2d 1044 (N.Y. 2008), quoting *White v. Continental Casualty Co.*, 9 N.Y.3d 264, 267 (2007), 878 N.E.2d 1019, 1021 (N.Y. 2007).

OPIC asserts that Big Sky’s own uncontroverted evidentiary showing in the claims determination process and in this arbitration demonstrates the Big Sky has failed to make the Investment as required by Section 1.01(1). With respect to the Debt Instrument of US \$1 million, OPIC points to the financial records provided by Big Sky evidencing incurrence by ANB of \$160,000 of interest expense and accrual by Big Sky of an identical amount of interest, all despite the fact that the On-Demand Promissory Note provided to OPIC in the insurance underwriting process was a non-interest-bearing instrument.

The ANB financial statements do not show any material indebtedness other than the debt obligation owing to Big Sky. Thus, argues OPIC:

Big Sky breached that obligation by accruing interest on the promissory note, thereby enabling it to recover a significant portion of its Investment in ANB through interest payments while simultaneously seeking compensation for the full face value by filing a claim under the Insurance Contract.

OPIC also asserts the Big Sky failed to contribute equipment constituting Covered Property to ANB as required by Section 1.01(1) of the Insurance Contract. OPIC points out that the ANB and Big Sky financial records provided to OPIC in the claims determination process “indicate that Big Sky leased equipment to ANB for \$360,000 and that ANB never took ownership of any fixed assets.” While Section 1.01(1) employs the phrase “up to” the sum of \$1,055,000, OPIC notes the phrase cannot properly be construed to mean zero.

OPIC contends that, if those financial records are accurate, then Big Sky never contributed any Covered Property to ANB at all. If, on the other hand, the records are not accurate, then Big Sky has separately breach the Insurance Contract requirement in Section 11.01(7) to “maintain ... true and complete ... records documenting the Investment ...,” prepared in accordance with “principles of accounting generally accepted in the United States”

Section 11.01(7)(d) of the Insurance Contract expressly requires that “financial statements of the Foreign Enterprise [ANB] shall be prepared as if the Foreign Enterprise were an independent corporate entity rather than a branch of the Investor [Big Sky].”

OPIC further argues that, during the claims determination process, “Big Sky represented to OPIC that the fixed assets were sold to ANB by Big Sky in exchange for the \$100 million note.” OPIC notes in its Dispositive Motion that, “[i]f Big Sky’s representation is credited, and ANB issued a \$1,000,000 note in exchange for equipment (that does not appear on its balance sheet), then neither component of the Investment was made in the manner required by the Insurance Contract.”

In response to these assertions, Big Sky presents Mr. Richie’s affidavit, the Expert Report of Mr. Robert D. Johnson (with exhibits) and the bank checks and deposit slips proffered in its supplemental filing.

Mr. Ritchie's affidavit does not address at all the above contentions made by OPIC in its Dispositive Motion, other than his "bald, conclusory" claim that "It is necessary for Big Sky to put on oral testimony to establish its record keeping procedure, why it filled out its tax returns in a manner it did...." Such an unsupported statement is not sufficient as a matter of law to create a dispute as to a material fact. As the New York courts have regularly reminded us, "Bald, conclusory allegations are insufficient to defeat a motion for summary judgment in lieu of complaint." *Nussdorf v. Lekach*, No. 10466-08, NYLJ Feb. 5, 2009, at 30, col. 1 (Nassau Co., Jan. 16, 2009)(Austin, J.). Stating the same principle in the same terms, *Marijosius v. Nemikas*, Index No: 011539- 08 (N.Y. Sup. Ct. N.Y Co, Dec. 7, 2010)(Driscoll, J.); *Federal Deposit Insurance Corporation v. Jacobs*, 185 A.D.2d 513 (N.Y. 2d Dep't.. 1992).

Mr. Ritchie's affidavit thus does not assist Big Sky in seeking to avoid summary judgment on the grounds set out in the Dispositive Motion.

Big Sky also argues without citation in its Response that a mere request by a party for a hearing is sufficient to require the Tribunal to take oral evidence, regardless of whether a genuine issue of disputed material fact exists. While there was once such a rule in the Arbitration Rules of the International Chamber of Commerce (a different arbitral institution and a different set of arbitration rules), there is no such requirement in the ICDR's International Rules or U.S. arbitration jurisprudence.

Mr. Johnson's Expert Report states that Big Sky's and ANB's financial statements "were prepared on the accrual basis of accounting and were reported on a consolidated basis." *Id.*, at 7.

With respect to the making of the \$1 million Debt Instrument and the investment of Covered Property of up to \$1,055,000, Mr. Johnson states in his report that "we have requested from the bookkeeper to obtain from the bank the canceled checks of James Richie [sic], to support the capital infusion of the \$1 million.... However, two additional items of support exist: 1) the Federal Income Tax Return, Form K-1, 2008, Beginning Capital Account \$1,023,153 of James Richie; and 2) Quick Books General Ledger Detail accounts reflecting the cash injection by Mr. Richie, in excess of the \$1,000,000; the Federal Income Tax Return, Balance Sheet and Detail Asset listing, coupled with the Detail Balance Sheet Detail provides evidence of the fixed assets being in excess of the \$1,055,000 requirement."

Mr. Johnson's Expert Report states that the tax return and the Quick Books accounts show a cash injection by Mr. Ritchie. However, what those documents do not show is that injection being made into ANB, rather than into Big Sky. Nor does the Expert Report assert that the sums in question were contributed by Mr. Ritchie to ANB, as distinct from Big Sky.

The cancelled checks referred to Mr. Johnson's Expert Report were submitted to the Tribunal in the December 20, 2013 supplemental filing. They are all checks drawn on the account of Soaring Eagles Orchard, Inc. (presumably, an account connected with Mr. Ritchie) or on the account of Mr. Ritchie in 2006 or 2007 and payable to Big Sky, not payable to ANB. Thus, those checks too do not corroborate Big Sky's claim that it made a contribution to ANB in the manner required by the Investment Contract.

Rather, the evidence presented by Big Sky shows only the payment of monies to Big Sky. That cannot fulfill the express terms of the Insurance Contract, even drawing all inferences favorably to Big Sky. OPIC's evidence on the point is therefore uncontradicted.

The ANB financial statements provided by Big Sky to OPIC do not show any fixed assets owned by ANB (i.e., no equipment comprising Covered Property owned by ANB). The financial statements instead record a leasing of equipment.

In response to an inquiry by OPIC regarding the Covered Property, Big Sky later responded that ANB had purchased the fixed assets from Big Sky. The financial records provided by Big Sky do not support that explanation; even if they did, a sale of the equipment to ANB by Big Sky is not a "contribution" that equipment within the "plain and ordinary meaning" of that term as used in Section 1.01(1) of the Insurance Contract. Neither Mr. Richie's affidavit nor Mr. Johnson's Expert Report takes issue with the conclusion that ANB leased or purchased the fixed assets from Big Sky, rather than Big Sky contributing the equipment to ANB as required by the Investment Contract. Mr. Johnson's Expert Report only states that "the Federal Income Tax Return, Balance Sheet and Detail Asset listing, coupled with the Detail Balance Sheet Detail provides evidence of the fixed assets being in excess of the \$1,055,000 requirement." That evidence goes to the worth of the fixed assets. But the Expert Report fails to address at all the contention by OPIC that the fixed assets were not contributed to ANB, again as distinct from Big Sky. Again, OPIC's evidence on the point is uncontradicted.

The ANB Profit and Loss Statement provided by Big Sky to OPIC shows ANB incurring \$172,432.11 of interest expense. The ANB financial statements do not show any material indebtedness owing to third parties. Consequently, the plain conclusion arises that ANB considered it was to pay interest to Big Sky on the Debt Instrument (whether recorded in the financial and tax documents on an accrual or cash accounting basis), contrary to the "zero-coupon" non-interest-bearing promissory note shown by Big Sky to OPIC during the underwriting process and identified in the Insurance Contract. The non-interest-bearing nature of the promissory note shown to OPIC is not disputed by Big Sky in these proceedings. The Ritchie affidavit, Mr. Johnson's Expert Report and the appended exhibits do not seek to contradict OPIC's information in that regard. Here too, there is no genuine issue of material fact with respect to the matter.

The cancelled checks provided by Big Sky in its supplemental submission do no more than corroborate the information in the QuickBooks general ledger detail and tax return that Mr. Richie or Soaring Eagles paid monies to Big Sky. They do not show a contribution of those sums from Big Sky to ANB. As discussed, the Insurance Contract expressly requires that the contribution of the Investment be made to ANB. The fact that Big Sky and ANB may be consolidated for tax and accounting purposes does not alter the contractual obligation in the Insurance Contract that the sums or property in question be contributed to the Foreign Enterprise, ANB, not to its parent Big Sky.

Although not argued in its Response by Big Sky, OPIC took pains in its Dispositive Motion to anticipate Big Sky might argue that the requirement in Section 1.01(1) of the Insurance Contract for Big Sky to contribute equipment "up to \$1,055,000 in worth" of equipment permits Big Sky to

contribute property of lesser worth. But the evidence presented by Big Sky shows either a sale or lease of equipment, not a contribution at all. Regardless of whether “up to” may justify contribution of property having a worth less than \$1,055,000, the Tribunal concludes that the “plain and ordinary meaning” of the obligation on the part of Big Sky to contribute equipment “up to \$1,055,000 in worth” in Section 1.01(1) is that Big Sky must contribute equipment – the provision cannot properly be construed to mean that Big Sky has no equipment contribution obligation at all.

Moreover, the “plain and ordinary meaning” of “contribute” in investment transactions is not to sell or lease the property in question, but rather to give. The evidence presented by Big Sky in the claims determination process and in this arbitration, including the ANB and Big Sky financial statements and Mr. Johnson’s Expert Report, does not dispute the absence of such a contribution of Covered Property, whatever the worth of the equipment in question may be. There is no genuine issue as to any material fact in that regard.

In light of the foregoing, drawing all justifiable inferences in favor of Big Sky and accepting the evidence presented by Big Sky, there is no genuine issue as to any material fact that (i) Big Sky has failed to contribute the portion of the Investment constituting the Debt Instrument to ANB as required by Section 1.01(1) of the Insurance Contract and (ii) has failed to contribute to ANB equipment comprising Covered Property as required by Section 1.01(1) of the Insurance Contract.

Under Sec. 11.02 of the Insurance Contract, if a material breach occurs OPIC is entitled *inter alia* to deny compensation. In New York, courts have defined a material breach as a breach “that goes to the root of the contract.” *Department of Economic Development v. Arthur Andersen & Co.*, 924 F.Supp. 449, 483 (S.D.N.Y. 1996). Moreover, New York courts will treat a breach as material “if a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions, the breach substantially defeats the contract’s purpose, or the breach is such that upon a reasonable interpretation of the contract, the parties considered the breach as vital to the existence of the contract ... [or] if the promisee receives something substantially less or different from that for which he or she bargained.” *Viacom Outdoor, Inc., v. Wixon Jewelers, Inc.*, 25 Misc.3d 1230(A), 2009 NY Slip Op 52346(U) (Sup. Ct. N.Y. County, November 18, 2009), *citing* 23 Williston on Contracts §63:3 (4th ed.).

The Investor’s obligation to make the Investment being insured by OPIC’s political risk coverage as called for by the Insurance Contract undeniably goes to the root of the Insurance Contract. By failing to contribute the Investment as required by Sec. 1.01(1), Big Sky has failed to perform an essential and vital term of the Insurance Contract. Those failures are clearly material breaches of Big Sky’s obligation to carry out the Investment described in the Insurance Contract. OPIC was thus entitled pursuant to the express terms of Sec. 11.02 of the Insurance Contract to refuse to pay compensation to Big Sky.

Accordingly, OPIC, as the moving party, “is entitled to judgment as a matter of law” pursuant to F.R.C.P. Rule 56(c). OPIC is therefore entitled to dismissal of Big Sky’s claims for compensation under the Insurance Contract.

(B) Failure to Maintain Proper Financial Records

OPIC argues that an independent ground for dismissing Big Sky's claims lies in the alleged failure by Big Sky to maintain financial records for ANB on the basis required by *inter alia* Sec. 11.01(7) of the Insurance Contract.

In light of the conclusions above regarding Big Sky's failure to contribute the Investment in accordance with the requirements of Section 1.01(1) of the Insurance Contract, this Partial Final Award does not need to address in detail that financial records argument by OPIC or Big Sky's response thereto. Article 16(3) of the International Rules, as noted above, authorizes the Tribunal in its discretion "to direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case." By focusing on the dispositive issue of Big Sky's failure to contribute the Investment in accordance with the Insurance Contract, rather than on the issue of Big Sky's alleged failure to keep proper financial records, the Tribunal is exercising that authority.

The Tribunal notes only in summary fashion that, if this Partial Final Award were to have addressed in detail the claim that Big Sky failed to maintain financial records for ANB on the basis required by *inter alia* Sec. 11.01(7) of the Insurance Contract, the Tribunal would have concluded that the books and records of ANB provided to OPIC by Big Sky in the claims determination process were not "true and complete," "prepared as if the Foreign Enterprise were an independent corporate entity rather than a branch of the Investor" or maintained or prepared "in accordance with principles of accounting generally accepted in the United States," all as required by Section 11.01(7) of the Insurance Contract.

The fact that GAAP and tax accounting may authorize consolidation of related entities and accrual accounting does not justify failing to comply with the express terms of the Insurance Contract. The failure to account for the fixed assets as either a contribution (as required for an Investment) or a sale or lease (contrary to the requirement for an Investment) on the books and records of ANB is inconsistent with the requirement the books and records be "true and complete" or prepared as if ANB was an independent corporate entity. Here too, OPIC's evidence is uncontroverted.

VII. Directions Regarding Costs and Attorneys' Fees

In its Dispositive Motion, OPIC requests "directions from the Tribunal as to the procedure by which OPIC should prove its costs and attorneys' fees." Big Sky does not specifically address that request in its Response.

Article 31 of the International Rules authorizes the Arbitrator to apportion such costs among the Parties if it determines that "such apportionment is reasonable." Costs subject to apportionment include fees and cost of the ICDR, fees and expenses of the Arbitrator, and "the reasonable costs for legal representation of a successful Party."

The Insurance Contract is silent regarding recovery by a prevailing party of fees, costs and expenses.

In light of the foregoing, the Arbitrator directs that OPIC shall submit to the Tribunal and to Big Sky, not later than two weeks after the date of this Partial Final Award, information as to the fees, costs and expenses for which OPIC seeks recovery in reasonable detail, identifying (i) with respect to fees for legal representation, for each month, the hours worked by each time-charging person, that person's rate as billed to OPIC, and a reasonable description of the tasks undertaken by that person during that month, and (ii) with respect to fees and expenses paid, whether by OPIC or by its attorneys, a specific description of each item exceeding \$1,000 and a general description of expenses of \$1,000 or less. OPIC shall further submit at the same time an explanation as to why it believes such fees, costs and expenses should be apportioned to Big Sky under Article 31.

Not later than two weeks after OPIC makes the foregoing submissions, Big Sky shall be entitled to make a responsive submission addressing (i) whether or not such fees, costs and expenses should be apportioned to Big Sky and (ii) any comments it wishes to make regarding the reasonableness of the sums for which OPIC seeks apportionment. Not later than one week thereafter, OPIC may submit a reply to Big Sky's responsive submission.

Following completion of the foregoing submissions, the Tribunal will determine whether apportionment is appropriate and, if so the sums to be apportioned. The Tribunal shall then issue a further final award with respect to those determinations, if appropriate.

AWARD

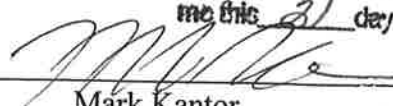

WHEREFORE, the undersigned Arbitrator hereby AWARDS as follows:

1. Respondent's Dispositive Motion is hereby granted and Claimant's Statement of Claim is hereby dismissed in full with prejudice.
2. The Parties shall comply with the process for submissions regarding apportionment of fees, costs and expenses set forth in Part VII above.
3. Except as provided in Awarding Paragraph 2 above, this Partial Final Award is in full settlement of all claims submitted in this arbitration proceeding and, to the extent any such claim is not specifically mentioned herein, it is denied.

I hereby certify that, for the purposes of Art. 1 of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, this Partial Final Award was made in Washington, D.C.

February 21, 2014
Date

City of Washington)
) SS:
District of Columbia)

Subscribed and sworn to before
me this 21 day of Feb 2014

Mark Kantor

M.R. Burness
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires April 14, 2014

I, Mark Kantor, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

February 21, 2014
Date

City of Washington)
) SS:
District of Columbia)


Mark Kantor

On this 21 day of February, 2014 before me personally came and appeared Mark Kantor, to me know and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Dated: Feb 21, 2014, 2014
Notary Public


My Commission Expires:

M.R. Burness
NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires April 14, 2014